

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35155

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 434
	)	
Plaintiff-Respondent,	)	Filed: April 22, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
MARK ROY JOHNSON,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge. Hon. Theresa L. Gardunia, Magistrate.

Order of the district court, on intermediate appeal from the magistrate division, affirming judgment of conviction for driving under the influence, affirmed.

Fox Law Offices, PLLC, Boise, for appellant. Brett R. Fox argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

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PERRY, Judge

Mark Roy Johnson appeals from the intermediate appellate order of the district court affirming Johnson's judgment of conviction for driving under the influence. Specifically, Johnson challenges the decision of the magistrate in denying a requested jury instruction on the necessity defense. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Several days before Christmas 2006, Johnson spent the day cooking food for a social event at a local hall. Johnson's friend, a woman who had experienced a heart attack twenty years earlier, became overheated and passed out while helping prepare the dinner. The paramedics were called, arrived, and were treating the patient. Johnson got in his vehicle to move it because he thought it might be blocking emergency personnel. Johnson hit several cars in the parking lot while moving his vehicle. The emergency personnel, who were at the scene to aid Johnson's

friend, detained Johnson until officers arrived. Subsequent testing revealed Johnson's blood alcohol content to be .347/.338. Johnson was charged with driving under the influence. I.C. § 18-8004.

On the day of trial, Johnson requested that the magistrate instruct the jury on the defense of necessity, asserting he needed to move his vehicle to allow treatment or transport of his friend. The magistrate denied Johnson's request, and he entered a conditional guilty plea reserving his right to appeal the denial of a necessity defense instruction. The magistrate sentenced Johnson to ten days in jail with options and a fine of \$1000, but withheld judgment and suspended both the jail time and fine pending appeal.

On appeal to the district court, both parties submitted briefs and argued. The district court affirmed the magistrate's denial of Johnson's requested necessity defense instruction. Johnson again appeals.

## **II.**

### **STANDARD OF REVIEW**

On review of a decision of the district court, rendered in its appellate capacity, we review the decision of the district court directly. *State v. DeWitt*, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Id.* If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Id.*

The question whether the jury has been properly instructed is a question of law over which we exercise free review. *State v. Gleason*, 123 Idaho 62, 65, 844 P.2d 691, 694 (1992). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993).

## **III.**

### **ANALYSIS**

Johnson argues that the magistrate erred in failing to give his requested jury instruction governing the defense of necessity and that the district court erred in affirming the magistrate's decision. Specifically, Johnson asserts that he reasonably believed that his vehicle might prevent

or slow the efforts of emergency personnel and that he needed to act quickly, thereby precluding him from asking someone else to move it. Therefore, Johnson argues the instruction should have been given and the jury should have been allowed to determine if Johnson's acts were reasonable. The state responds that Johnson was properly denied a jury instruction on the necessity defense because no reasonable view of the evidence would support such an instruction.

The common law necessity defense is recognized in Idaho. *See, e.g., State v. Chisholm*, 126 Idaho 319, 321, 882 P.2d 974, 976 (Ct. App. 1994). This defense is based upon the premise that an illegal act should not be punished if the act was committed in order to prevent a greater harm. *Id.* The elements of the necessity defense are: (1) a specific threat of immediate harm; (2) the circumstances that necessitated the illegal act were not caused by the defendant; (3) the same objective could not have been accomplished by a less offensive alternative available to the defendant; and, 4) the harm caused was not disproportionate to the harm avoided. *State v. Hastings*, 118 Idaho 854, 855, 801 P.2d 563, 564 (1990); I.C.J.I. 1512. The jury instruction for the necessity defense also provides that "the state must prove beyond a reasonable doubt that the defendant did not act because of necessity." I.C.J.I. 1512.

There is no entitlement to a jury instruction on the defense of necessity when no reasonable view of the evidence supports the elements of the instruction. *See State v. Howley*, 128 Idaho 874, 879, 920 P.2d 391, 396 (1996). In that case, Howley was charged with kidnapping. Howley asserted that the victim was kidnapped to prevent her from moving with her children to a place in Montana that was near a church-owned bomb shelter that supposedly contained many guns and ammunition. However, because the evidence showed that the victim was only contemplating a move that was sixty to ninety miles from the shelter, the Court concluded that Howley had not presented a specific threat of immediate harm to the victim or her children that would justify the necessity defense. *Id.* The Court also noted that the evidence in that case "was clear that [the] objective could have been accomplished by a less offensive alternative," but that no alternative efforts were made to avoid the kidnapping. *Id.*

In this case, after a discussion in chambers where the magistrate declined to grant Johnson's request for a jury instruction on the necessity defense, Johnson made the following offer of proof:

We believe testimony presented from defense witnesses would have included statements by [Johnson's friend], who was believed that she was having a heart attack or possibly a stroke. . . .

[Johnson's friend] was in the kitchen cooking, Your Honor, with Mark Johnson along with some other people. There was approximately a hundred--100 plus people would have been at the event, that had reservations made.

At some point in time--approximately an hour after [Johnson's friend] arrived in the kitchen, she was plating desserts. Mr. Johnson was cooking Lutefisk as well as the white sauce and meatballs and all the fixings.

[Johnson friend] had a coat on, at some point, indicated that she felt warm and faint. She walked to a back room behind the kitchen, and [another friend] happened to be there. As she walked out of the room, she fainted. The testimony would have been that she was white as a ghost. They were extremely concerned that she had a heart attack or a stroke. She had a prior heart attack 20 years ago and still suffers from hypertension and takes medication on a daily basis.

....

At some point, they elected to move [Johnson's friend] up the steps by the side door, which Mr. Johnson was parked right outside of. Paramedics were called. [Johnson's friend] was treated by the paramedics and eventually moved from inside the building to the ambulance so they could conduct an EKG. She ended up declining transport, and they determined that she was okay. It wasn't a heart attack.

Prior to [Johnson's friend] being escorted outside to the ambulance, someone--we believe it was [another guest]--indicated to [Johnson], hey, you need to move your car. The paramedics are here. We think she's having a heart attack. Get it out of the way.

In doing so, Your Honor, Mr. Johnson--and we admit, had been consuming alcohol. He did bump a couple of vehicles in the parking lot in an effort to get out of the way. There was no damage to any of those vehicles. Mr. Johnson subsequently was charged with DUI, excessive.

In response to Johnson's offer of proof, the state asserted:

The facts that I think--[Johnson's] offer of proof regarding this defense that I think are the most important are, first off, the fact that there were in excess of 100 other people, besides [Johnson], including several firefighters and paramedics who were on the scene at the time. And also, that his truck was not, in fact, blocking anything. The area where the paramedics and the firefighters had driven up, there was a side door to the building that led out to the driveway. There was a fire truck in that driveway that was next to the door. There was an ambulance behind that, and then the back parking lot in an area that wasn't blocking anything. That's where [Johnson's] truck was at the time.

We have some pictures from [defense counsel] that demonstrated--that were taken by his client that demonstrates the positioning of the vehicles at that time, and it is pretty clear that [Johnson's] truck wasn't blocking anything. And that in and of itself, negates, number one, that there be a specific threat of immediate harm to a named person. The only harm that I can even think of was that his vehicle was blocking the paramedics' access to be able to get inside the building to be able to treat the individual who had had the heart attack and the stroke, or whatever it actually was that she was suffering from. And given that

his vehicle was not only located in the back parking lot, but at the time he actually got behind the wheel and started to pull out, the paramedics and the firefighters were already inside working on her. And the firefighters were actually packing up and getting ready to leave.

So that completely eviscerates any possibility of [Johnson] being able to show, number two--or excuse me, number one--number two, I think he's shown--number three, [Johnson] could not have prevented the threat and harm by any less offenseable [sic] alternative. There were other people available, including sober firefighters and paramedics that could have moved the car, if it was actually necessary to do so, which we don't believe that it was. And that also sort of ties into number four.

The actual driving pattern here, I would note that the firefighters--quoting from the police report here--"Watched in awe as the truck struck a parked car while negotiating the turn. He was even more perplexed when he watched the truck back up, then strike a parked car several more times while trying his turn. They watched Johnson drive around the car and then strike another car. Finally, the firefighters were able to get to his car and get him out and detain him until the Ada County Sheriff's deputies could arrive." This is not an issue of necessity. They were already inside. They were working on the woman, and certainly there was a health risk present.

We don't even know who it was, or if anyone actually did tell [Johnson] to move the car. It certainly wasn't one of the paramedics. It may have been another intoxicated person at the scene, but based on the totality of the circumstances and facts, there is simply no way that any objective onlooker can see a truck that is parked in a back parking lot away from somebody and believe that the truck is blocking access to paramedics who are already inside the building working on someone, and someone who ended up being completely released because she was not in a serious or grave health risk. Perhaps, in his subjective drunken state, he believed that he needed to do that, but it was not an objectively reasonable belief based on the circumstances.

[Johnson's] offer of proof simply does not amount to anything that a reasonable jury could interpret as being necessary actions under the circumstances to prevent a specific harm.

The magistrate found that the evidence did not support three of the four elements required for the necessity defense. Specifically, the magistrate noted:

Number one is that there has to be a specific threat of immediate harm. It doesn't appear to me that the harm in this particular instance was immediate. Fire and ambulance had both responded to the location, so the immediate harm at the point the vehicle was moved seems to me to have been alleviated. So I don't believe that Mr. Johnson meets the first criteria that he would have to meet in order for the Court to give the necessity defense.

....

Number three, that [Johnson] could not have prevented the harm by any less offensive alternative. I don't think that Mr. Johnson meets that either,

because certainly if there were other individuals there at the party that he didn't trust were not under the influence of alcohol--certainly not all of the emergency personnel who had responded to this particular emergency were occupied with [Johnson's friend]--so certainly, Mr. Johnson could have looked to one of those individuals to move the car, if, in fact, the vehicle needed to even be moved. And I don't know that I agree that it did need to be moved. Because certainly the request did not come, as far as I understand, from any of the emergency personnel who responded on scene.

With respect to number four, the harm caused in violating the law was less than a threatened harm, questionable. Mr. Johnson had a .347, .338 BAC, so questionable as to whether or not his choice to get into that truck to move it given his state of intoxication was less consequential than the threatened harm in this case. I find that he does not meet the criteria needed for this Court to give the necessity instruction.

After the magistrate denied Johnson's request for a necessity instruction, Johnson appealed to the district court. The district court entertained argument and entered a written order affirming the magistrate's denial of the instruction, essentially on the same grounds relied upon by the magistrate. Specifically, the district court determined:

Johnson failed to show any specific threat of immediate harm that existed at the time Johnson moved his car.

At the time, the fire and ambulance had both responded to [Johnson's friend's] apparent heart attack and were treating her. [Johnson's] truck was in a parking lot behind the building. The truck was not blocking an entrance to the building. Johnson's subjective belief that the emergency vehicles would need to continue forward around the back of the building and that they would not be able to make it around the back of the building and that they would not be able to make it around the building with Johnson's car in its original position is insufficient. . . .

The evidence was that the emergency vehicles left by backing out of the same driveway they had pulled into. There was no evidence presented that Johnson's vehicle impeded the emergency workers in any way.

While the lack of a specific threat of immediate harm precludes the defense of necessity, the Court also notes that the evidence in this case was clear that Johnson's objective could have been accomplished by a less offensive alternative that was available to him. Over 100 people were at the event and Johnson could have asked one of the other guests to move his car. If none of the other guests were able to move his car safely, Johnson could have asked one of the emergency workers. Even if Johnson's car had impeded the emergency vehicles, nothing in the offer of proof suggests that someone else could not have moved it.

We agree with the conclusions of the magistrate and district court. Not only does the evidence presented show that Johnson's vehicle was not blocking access to the paramedics, it indicates that the paramedics were finished or nearly finished working on his friend when Johnson moved his vehicle. The evidence also shows that his friend declined transport and that the ambulance left by backing out the same way it entered. At oral argument before this Court, Johnson argued that the fire truck was blocked in but the ambulance was not. Therefore, Johnson has not shown he acted to avoid a specific threat of immediate harm. Furthermore, much like *Howley*, the evidence in this case demonstrates that the objective could have been accomplished by a less offensive alternative--Johnson could have asked someone else to move his vehicle. Johnson concedes that there were at least 100 other people at the gathering. Although Johnson's appellate brief cites several cases from other states for the proposition that the jury should decide if his acts were reasonable, he has failed to meet the Idaho standard for a necessity defense. Specifically, Johnson has failed to show that a reasonable view of the facts meets the prima facie elements—that there was a specific threat of immediate harm and the same objective could not have been accomplished by a less offensive alternative.

#### **IV.**

#### **CONCLUSION**

The magistrate did not err in declining to instruct the jury on the affirmative defense of necessity. Therefore, the order of the district court affirming Johnson's judgment of conviction is affirmed.

Chief Judge LANSING and Judge GRATTON, **CONCUR.**